No. 558.

Answer of L. C.

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No. 558.

UNITED STATES OF AMERICA,

IN THE SUPREME COURT.

JAMES W. WILSON, PLAINTIFF IN ERROR,

versus

THE STATE OF NORTH CAROLINA, ON THE RELATION OF L. C. CALDWELL, DEFENDANT IN ERROR.

To the Honorable the Supreme Court of the United States of America:

The answer of L. C. Caldwell, respondent, to the petition of the plaintiff in error, respectfully showeth:

1. That on the 23d day of September, 1897, the Governor of North Carolina, in pursuance of the power and authority confided in him, and the duties imposed upon him by the public laws of North Carolina, section 1, chapter 320 of the Acts of the General Assembly, at the session of 1891, and after due notice to the plaintiff in error, and due enquiry in the premises, suspended the said James W. Wilson from his office of Railroad Commissioner, and appointed the said relator, L. C. Caldwell, to fill the vacancy created by said suspension.

That the said relator thereupon on the 24th day of September, 1897, was duly qualified by taking the oaths prescribed by law, and made due demand upon the plaintiff in

error for the possession of said office, and upon the refusal of the said plaintiff in error to comply with said reasonable demand the defendant in error herein brought an action in the nature of *quo warranto* in the Superior Court of Iredell County, in said State, a court of competent jurisdiction, to oust the said plaintiff in error from the said office, and to induct the said relator therein, and for other relief.

That upon the trial in said Superior Court the presiding Judge thereof declined to submit any issues of fact to a jury, and rendered judgment in favor of the plaintiff and the relator in said action, and that the defendant appealed from said judgment to the Supreme Court of said State.

This respondent admits, as he is informed and believes, that a *supersedeas* bond was filed in the said Superior Court, but this respondent says that upon the hearing of said appeal being advanced in the Supreme Court of North Carolina the said respondent took no steps to get possession of the said office until the determination of the case in the said court; and the plaintiff in error continued to discharge its duties.

2. That the judgment in said appeal was rendered in said Supreme Court of North Carolina about 4:30 o'clock P. M. on the 23d day of December, 1897, and a writ was issued out of said court at 5:30 P. M. of said day, as set out in the third article of the affidavit of the plaintiff in error.

This respondent further says that the said writ was immediately placed in the hands of the Sheriff of Iredell County by the Clerk of the said Supreme Court, and that said Sheriff, as this defendant is informed and believes, went to the offices of the Railroad Commission for the purpose of executing said writ, but that the said plaintiff in error was not to be found, and, as this respondent is informed and believes, was absent from the said county and State for the purpose of avoiding service of the same; that the doors of the said room were locked and no person was

left in charge thereof, and the persons having keys to said offices were purposely out of the city, and respondent is informed and believes and avers, for the purpose of preventing and hindering the execution of the said writ. That, as respondent is informed and believes, the said Sheriff left the said rooms with the avowed purpose of geting the keys or other means of entry therein, and did not return. And that this respondent, with John H. Pearson, who was in like case with himself, after waiting a reasonable time for the return of the said Sheriff, and being advised by counsel that he had good right in law so to do, procured the doors of said room to be opened, and entered therein and assumed to exercise the duties of the office of Railroad Commissioner.

Respondent found upon taking charge of said office that the seal of said Commission had been taken away, as he is informed and believes, by the late Chairman of said Commission, and caused to be deposited in one of the banks of Raleigh.

And affiant is advised, informed and believes that, having been accompanied by the Sheriff with said process in his hands, into the front porch of said Commission rooms, he was in contemplation of law placed in possession of the whole, and that he had the right to open the doors and remove any obstruction to the full possession and occupation of said Railroad Commission rooms and every part of the same.

3. That this respondent believes that a writ of error was sued out by the counsel of the plaintiff in error, and was allowed by the Chief Justice of the Supreme Court of North Carolina, as alleged in the fourth article of the petition, and that a paper purporting to be a bond, conditioned as required by law in cases of *supersedeas*, was tendered by said counsel and approved by said Chief Justice on the 23d day of December, 1897, and that the said writ of

error, with the petition therefor, and the assignment of error and the citation and bond were filed in the Clerk's office as alleged in said article of the petition. But this respondent denies that any notice of the filing of said bond was served upon him, or that he had any knowledge of the filing of said bond until the day after the occurrence herein set out, and he avers that the citation was not served upon him until the 25th day of December, 1897, at 3 o'clock P. M. And this respondent is advised and believes that the said bond, even if sufficient in law as a *supersedeas* bond, will not have any other effect in law than to stay proceedings for the enforcement of the judgment for costs in said action, and does not defer the relator's right to take possession of said office and hold the same.

This respondent has no knowledge nor information as to the allegations of said petition that his counsel, W. H. Day, Esq., went to the Clerk's office and examined said bond. And this respondent avers that neither said counsel nor any other person informed respondent of the filing of said bond.

That affiant did not communicate with or receive any advice or counsel from W. H. Day after the Sheriff of Wake County left the building in which the Railroad Commission offices are located, which was long prior to filing the *supersedeas* bond in the office of the Clerk of the Supreme Court of North Carolina.

This respondent denies that the Governor of North Carolina either before or after the copy of the writ of error was handed to him, if it was so handed, of which this respondent has no knowledge, sent for a locksmith and sent him with said Caldwell and Pearson with instructions to pick said locks and open the doors. But respondent avers that respondent with said Pearson, on advice of counsel, believed then, and still believing that they had the right so

to do, procured the doors to be opened by a locksmith, without unnecessary force or violence, and entered and took possession of said offices.

This respondent denies that he well knew of the action of the Chief Justice in the premises. He admits that he had a conference with the Governor, and had from him information that the Chief Justice of North Carolina either had allowed or probably would allow the writ or error; but this respondent had no knowledge of any kind of the filing of any bond purporting to be a *supersedeas* bond or one the effect of which would be to effect a stay of proceedings in said action, until he saw an article in the newspapers of Raleigh on the morning after he had so gone into possession of said office.

4. That it is true, as alleged in the fifth article of the petition, that on the morning of the 24th of December, 1897, W. H. Day, Esq., as counsel for the relator, made a motion in the Supreme Court to set aside said *supersedeas*, and at the same time the petitioner's counsel made a motion that said execution, or writ of possession, be recalled on account of the *supersedeas*, and that both motions were refused.

This respondent says that the opinion delivered by said Court upon said motions is filed herewith. He admits that since that time he, with said Pearson, has begun to discharge the duties of the said office of Railroad Commissioner, and the Commission has held a regular meeting for the transaction of business. And this respondent, as he is advised and believes, avers that the plaintiff in error has no rights in the premises. That this defendant relies upon the law as applied to the facts set out in the transcript and record filed by petitioner, and respectfully submits to this honorable Court that he has acted strictly within the rights and duties imposed upon him by law and under advice of counsel learned in the law.

And he expressly disclaims and denies that any act of his in the premises was done in contempt of this honorable Court.

And having thus fully answered, your respondent prays to be hence dismissed with his costs, and your respondent will ever pray, etc.

UNITED STATES OF AMERICA,
EASTERN DISTRICT OF NORTH CAROLINA.

L. C. Caldwell, being duly sworn, deposes and says that the foregoing answer is true of his own knowledge, except as to allegations therein made on information and belief, and as to those matters he believes it to be true.

Sworn and subscribed before me this ---- day of January, 1898.

No. 305.

NORTH CAROLINA SUPREME COURT,

SEPTEMBER TERM, 1897.

L. C. CALDWELL
vs.
J. W. WILSON.
From Iredell.

Clark, J. This is a motion by defendant to recall the execution which issued to put the relator in possession of the furniture, rooms and other tangible property belonging to the Railroad Commission. The relator moved to set aside the *supersedeas* proceedings or adjudge them irregular. We are of opinion that we have no power to set aside the writ of error or pass the regularity thereof. We are also of opinion that the judgment of this Court *ex proprio vigore* placed the relator in possession of the office at the time the judgment was filed. He having already qualified, no pro-

cess was necessary for that purpose. He is in full possession of the same and in full power to exercise its duties, and draw the salary thereto attached, from the date of his appointment. The judgment took effect immediately upon being filed, and is not superseded by the subsequent writ of error, regular or irregular. *Foster* v. *Kansas*, 112 U. S., 201. The relator being in office by virtue of the judgment of this Court, any attempt by the defendant to exercise its functions, or to interfere with the full and free exercise thereof by the relator, and any attempt by any one else to interfere by alleged legal process or otherwise, unless and until the Supreme Court of the United States shall reverse the judgment of this Court, will be a contempt of this Court. We decline to make any order recalling the execution. Both motions refused.

No. .....

UNITED STATES OF AMERICA,

IN THE SUPREME COURT.

OCTOBER TERM, 1897.

JAMES W. WILSON, *Plaintiff in Error*,

versus

THE STATE OF NORTH CAROLINA, ON THE RELATION OF L. C. CALDWELL, *Defendant in Error.*

W. H. Day, being duly sworn, says he is of counsel for the defendant in error in the above entitled cause. That on the evening of the 22d of December, 1897, he was present when the Sheriff of Wake County went with the defendant Caldwell and J. H. Pearson to the offices of the Railroad Commission. That said Sheriff went to the doors of the Commission rooms, fronting on the porch on Edenton Street. That said doors were locked. The Sheriff and said Caldwell and Pearson then passed through the hall, between the Railroad Commission rooms and the Agricultural rooms, to the rear door of said Commission offices on the hall. That this door was also locked. The Sheriff was requested by this affiant to force said door and put the defendant in error in possession of said offices.

The Sheriff replied, he did not want to force the door, but would go for the janitor of the building and get the key, return, and put them in possession. That if the janitor

did not have the key, he would return and force the door, and put them in possession. That the Sheriff then left and did not return. That this affiant then advised the defendant that he had the right to force said doors, and enter and take possession of the Railroad Commission offices. That this was long prior to the filing of the writ of error and *supersedeas* bond in the office of the Clerk of the Supreme Court of North Carolina. That this affiant then left, and did not see or communicate with the defendant in error till the succeeding day. That this affiant went to the office of the Clerk of the Supreme Court, and saw the writ of error and *supersedeas* bond, about two hours after he left the Railroad Commission office, but he did not see defendant in error or communicate with them after he saw said writ of error and *supersedeas* bond, till the next day. W. H. Day.

Sworn and subscribed before me, this 11th day of January, 1898. N. J. Riddick,
Clerk U. S. Circuit Court, Eastern District N. C.

NORTH CAROLINA—Wake County.

H. C. Brown, being duly sworn, says: That he is now Clerk to the Board of Railroad Commission in and for the State of North Carolina, and has been since its organization, under the Act of the General Assembly of 1891. That said Railroad Commission has a seal; that the same was taken from the office of said Railroad Commission between the first and fifteenth day of December, 1897, by James W. Wilson, one of the former Commissioners, and Chairman of said Commission; and the said seal was kept out of said office until the 25th day of December, 1897, when said Wilson notified affiant that said seal of office was at the Citizens Bank, subject to his order. H. C. Brown.

Sworn to and subscribed before me, this January 13th, 1898. A. B. Andrews,
Notary Public, Wake County, N. C.

No. .....

UNITED STATES OF AMERICA,

IN THE SUPREME COURT.

JAMES W. WILSON, *Plaintiff in Error*,

versus

THE STATE OF NORTH CAROLINA On the Relation of L. C. CALDWELL, *Defendant in Error.*

Respondent's Brief on the Motion to Attach for Contempt.

The respondent respectfully submits that he has not been guilty of contempt of this Honorable Court—

I. Because the judgment of the Supreme Court of North Carolina was in itself self-executing, and needed no writ to enforce it.

The Code of North Carolina, sec. 611, is as follows: "If the judgment be rendered upon the right of the person so alleged to be entitled, and the same be in favor of such person, he shall be entitled, after taking the oath of office and executing such official bond as may be required by law, *to take upon himself the execution of the office;* and it shall be his duty, immediately thereafter, to demand of the defendant in the action all the books and papers in his custody or within his power belonging to the office from which he shall have been excluded."

The judgment of the Superior Court, affirmed by and made the final judgment of the Supreme Court of North Carolina, operated of itself to suspend the plaintiff in error from the office of Railroad Commissioner. There was no vacancy, because it had already been filled by appointment of the Governor under the law—Acts of 1891, ch. 320, sec. 1.

Respondent had already qualified by taking the oath of office immediately upon his appointment, and no bond was required of him.

There was no undue haste, either on the part of the respondent or of the Courts; the policy of the law requires the trial of such cases to be expedited. Code of North Carolina, sec. 616.

In pursuance of this policy, on application of counsel for relator, in open Court, no objection being made thereto (see opinion of Mr. Justice Clark attached to respondent's answer), the Supreme Court rendered final judgment and directed process to issue under section 957 of The Code of North Carolina.

The respondent being already in office by virtue of his appointment and of the judgment, it required no writ to put him in. But the Sheriff, in obedience to the writ, went with respondent upon the porch of the building and to the door of the Commission rooms, and, finding it closed, left him there.

The suspended officers were absent, as respondent swears, to avoid service of the writ; the clerk and janitor were gone, the seal removed, the doors locked.

The respondent had been by the final judgment declared the rightful incumbent, and by the statute directed to take possession.

We submit that, being in the building, if he had had the key, he might have unlocked the door and gone in; he was to all intents and purposes in possession, and the Sheriff's duty was performed immediately after 5.30 p. m., there being no physical opposition to the entry of respondent, requiring the power of the county to overcome it.

This was more than an hour before the filing of the writ of error and bond in the office of the Clerk of the Supreme Court—at 7.10 o'clock on the same day—and it made no difference that respondent did not procure the doors to be opened for some hous later.

Herman on Executions, § 529.
Freeman on Executions, §§ 473, 474.

Relator should be left in quiet possession; here there was no one to remove from the office or rooms. What was more appropriate to be done than for the relator to have quietly sent for a locksmith and had the door opened.

"Where, upon *quo warranto*, there is a judgment that the relator is entitled to the office, and that defendant be ousted and pay costs, and he appeals to the Supreme Court and files a *supersedeas* bond in the form provided by law: Held that from such judgment an appeal will lie, and that the *supersedeas* bond will stay proceedings for the enforcement of the judgment for costs, but doe not defer the relator's right to take possession of the office under chapter 6, section 20 of The Code, no process being required to execute the judgment in that respect.

Fawcett *v.* Superior Court, 15 Washington Rep., 342.
S. C. 55 Am. St. Rep., 894.
Joyse *v.* Drorburgh, 63 Iowa, 711.

"Upon a judgment of amotion from office, the party amoved is divested of all official authority and excluded from office so long as the judgment remains in force." (High on Ex. Rem., § 756). And when judgment is rendered in favor of a relator, he needs no writ to invest him with the office. Under section 8639, How. Stat., he is entitled to take upon himself the execution of the office. Can this right be defeated or suspended by suing out a writ of error and giving a bond to stay execution? The statute (secs. 8697,

8681) provides for a stay of execution by suing out a writ of error, but does not authorize a suspension of a judgment which requires no aid from process to give it effect. The practical result of permitting such a writ to suspend the judgment in *quo warranto* cases *would in many cases be to defeat the relator of his remedy wholly.* Such a construction is not to be indulged, except it be imperatively required by the terms, which we think is not the case here."

People *ex rel.* Wagenseil *v.* Stephenson, 98 Mich., 218.

"Upon the rendition of a regular judgment of ouster in the suit of the people against a public officer, and in favor of another individual for the office, the officer becomes actually ousted and excluded from office, and the party declared to be entitled, upon taking the official oath and filing his bond (when required), becomes, *eo instanti*, invested with the office and entitled under section 437 of The Code to demand and have the books and papers appertaining to the office."

Welsh *v.* Cook, 7 How. Pr. Rep., 282, especially pages 285–6.

Section 437 of the New York Code is substantially the same as section 611 of the North Carolina Code.

"A judgment suspending an attorney from practice executes itself, except as to the collection of costs, and is not affected by an appeal therefrom to the Supreme Court and obtaining a *supersedeas.*"

Walls *v.* Palmer, 64 Ind., 493.

"Under a statutory provision that 'if judgment be rendered in favor of such claimant he shall proceed to exercise the functions of the office after he has qualified as required by law,' a *supersedeas* bond filed on appeal to the Supreme Court from a judgment in favor of the claimant stays proceedings for the enforcement for costs, but does not defer

the relator's right to take possession of the office, no process being required to execute the judgment in that respect."

Payne on Elections, 852.
Mechem on Pub. Office, sec. 497.

"The judgment requires no aid from process to give it effect. 98 Mich., *supra*. His appeal, in the absence of an express provision of the law to the contrary, did not, and could not, in the very nature of things, affect the judgment; the judgment was not annulled thereby, but it remained in full force and effect. Such seems to be the uniform rulings of all Courts on this question. The authorities cited above seem to be conclusive on these points, and a number of them expressly hold that a *supersedeas* does not lie in a contested election case, and there is not a single authority to the contrary, so far as we can ascertain."

State *ex rel.* Craig *v.* Woodson, 128 Mo., at p. 506.

"Sec. 1007 of the Rev. Stat., which, as amended by the Act of February 18, 1875 (18 Stat., part 3, p. 316), provides that where a writ of error may operate as a *supersedeas*, execution shall not issue until the expiration of ten days after the rendition of the judgment, has reference only to the judgments of the courts of the United States."

Doyle *v.* Wisconsin, 94 U. S., 50.

II. But if it had been necessary that the Sheriff should have gone further in execution of the writ by opening the door, and if the bond filed did not have the effect of a *supersedeas* as contended by the plaintiff in error, we respectfully submit that there can be no contempt without the intent to commit it—in this case to disobey an order of this Court. And respondent swears he did not know of the filing of the bond in the Clerk's office at the time he took possession of the rooms and assumed the office, and not until the next day. And further, that he acted under advice of counsel.

The better, but, as we shall see, not the unanimous opinion, is that on a rule to show cause why a party should not be punished for contempt, the actual intention of the party is material, and if the respondent disavows, upon oath, any intention of committing a contempt, the rule will be discharged.

Rapalge on Contempt, § 121.
In re Moore, 63 N. C., 397.
Re Walker, 82 N. C., 95.
Bond *v.* Bond, 69 N. C., 97.

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